No. 84-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, et al.,

Appellants,

—v.—

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., THE CENTER FOR POPULATION OPTIONS, THE AMERICAN JEWISH COMMITTEE, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN FAMILY PLANNING, THE NATIONAL BOARD OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., THE AMERICAN JEWISH CONGRESS, ASSOCIATION OF PLANNED PARENTHOOD PROFESSIONALS, INC., PHYSICIANS FOR CHOICE, THE AMERICAN PUBLIC HEALTH ASSOCIATION, AND INDIVIDUAL PROFESSORS, PHYSICIANS AND MEDICAL SCHOOL DEANS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI*

Planned Parenthood Federation of America, Inc. (PPFA) is a not-for-profit corporation organized in 1922. PPFA is the leading national voluntary public health organization in the field of family planning with 186 affiliates in 44 states and the District of Columbia operating approximately 761 family planning clinics. Forty-four affiliates provide abortion services and most of the affiliates which do not perform abortions offer pregnancy counseling and referral.

The American Public Health Association (APHA) is a national nongovernmental organization. With a membership of over 50,000, it is the largest public health organization in the world. At its national conventions, APHA has repeatedly stated its support for legalized abortion.

The Center for Population Options (CPO) is a national organization concerned with the prevention of unintended adolescent pregnancy. CPO believes that the adolescent's option as to whether or not to have an abortion must be maintained.

The American Jewish Committee (AJC), a national organization dedicated to the protection of civil and religious rights, supports access to abortion as part of its traditional concern for individual liberty, privacy, and free choice.

National Association of Nurse Practitioners in Family Planning (NANPFP) is a national non-profit membership organization of professional nurse practitioners. The aim of the organization is to assure accessible quality family planning services which guarantee reproductive freedom to all.

The National Board of the Young Women's Christian Association of the U.S.A. (YWCA) represents over two million

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* All parties have given their consent to the filing of this brief in letters filed with the Clerk of this Court.

women and girls. The YWCA, a non-profit organization, has had a policy since 1967 of supporting a woman's right to choose whether or not to have an abortion, uncoerced by government.

The American Jewish Congress is a national organization of American Jews. It neither favors nor opposes abortion but believes that a woman's decision whether to undergo abortion must be her own, uncoerced by government.

Association of Planned Parenthood Professionals, Inc. (APPP) is a New York not-for-profit corporation whose members are physicians and health professionals associated with family planning.

Physicians for Choice, a project of PPFA, is a nationwide, bipartisan organization of 4,000 physicians which supports family planning issues and believes in preserving the right of women to decide when or whether to bear a child.

Individual Professors, Physicians and Medica' School Deans practice obstetrics and gynecology as their medical specialty or are responsible for the education of medical students and residents, some of whom are in training in the specialty of obstetrics and gynecology.

Amici submit this brief in order to demonstrate for the Court the detrimental impact the Pennsylvania law would have on the health and welfare of women in need of abortions.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Appellees.

Section 3205 of the Pennsylvania Abortion Control Act, requiring that certain information be given to every woman requesting an abortion, both in its bias and inflexibility, violates the standards set by this Court in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 442-49 (1983), for laws purporting to secure "informed consent" to abortion. Moreover, by requiring physicians to act as the couriers of the state's ideological message on abortion, the section violates the first amendment.

Section 3206 of the Act, requiring parental consent for abortion, violates standards established by this Court because it fails to set forth a sufficiently detailed procedure that guarantees confidentiality and expedition for minors attempting to utilize the courts to bypass parental involvement. *Bellotti v. Baird*, 443 U.S. 622 (1979).

Section 3214 of the Act, mandating separate reports and public disclosure of individual abortions, is unconstitutional because it would increase the cost of abortions and because of the violence against patients and clinic personnel which may result from such disclosure.

Section 3210(b), requiring that abortion techniques likely to result in live birth be used after viability unless they would pose "significantly greater" medical risk to the woman, unconstitutionally requires women to risk their life and health to benefit the fetus. Moreover, the section is unconstitutionally vague in failing to give physicians notice of what degree of risk their patients are required to bear.

Section 3210(c), which requires the presence of a second doctor where there is a possibility of the fetus "surviving" the abortion, is unconstitutional because it fails to make an exception for emergencies.

ARGUMENT

I. THE INFORMED CONSENT PROVISIONS OF THE PENNSYLVANIA ACT ARE UNCONSTITUTIONAL

A. The Informed Consent Provisions Of The Pennsylvania Act Significantly Interfere With A Woman's Right To Abortion

Although the state may attempt to ensure that a woman makes the decision between abortion and childbirth in an informed and voluntary manner, it does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 443 (1983). In *Akron*, this Court articulated two tests for the constitutionality of laws requiring "informed consent" for abortion. First, the state may not require that a woman be given non-informative irrelevant information designed to dissuade her from having an abortion. 462 U.S. at 444. The second test has more sweeping implications: while the state may prescribe the general areas to be discussed, it may not prescribe the specific information to be given, for to do so fails to give the physician leeway to tailor the information to the needs of the individual patient. *Id.* at 445. *See also Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 362-63 (6th Cir. 1984) (state may not prescribe content of abortion counseling). The Pennsylvania law, both in its bias and inflexibility, fails both tests.[1]

1. *Section 3205(a)(1)(ii)—Unforeseeable Risks*

The Pennsylvania law requires that the clinician recite to every patient desiring an abortion a statement that "there may be detrimental physical and psychological effects which are not accurately foreseeable". As an inflexible script which must be recited to each patient regardless of her individual circumstances, it obviously violates the second prong of the *Akron* test. 462 U.S. at 445.[2] Its bias and irrelevance are even more glaring defects, however.

1 Although the sections which follow outline objections to individual items of the informed consent requirement, *amici* agree with the court below that the entire section falls as a whole. *American College of Obstetricians and Gynecologists, Pennsylvania Section (A.C.O.G.) v. Thornburgh*, 737 F.2d 283, 296 (3d Cir. 1984).

This statement gives the woman no useful information whatsoever. It merely recites an axiom applicable to any activity in life: that it is attended with some element of unknowable risk. It does so, however, in a particularly unsettling form designed to give the impression that abortion is a dangerous operation fraught with undocumented perils. Quite the contrary is true. Massive studies on the epidemiology of abortion have rendered it, according to one expert, "the best-researched procedure in obstetrics and gynecology."[3] Abortion is also one

2 Although this Court upheld the identical provision contained in an earlier version of the Pennsylvania law, it did so by a summary affirmance which has little precedential value in this case. *Planned Parenthood Association v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd*, 428 U.S. 901 (1976). This Court has held repeatedly that summary dispositions affirm only the judgment, but not the reasoning of the court below. *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Mandel v. Bradley*, 432 U.S. 173 (1977).

The Court has not hesitated to disregard a rule upheld in a summary affirmance upon fuller consideration of the issues. *Fusari v. Steinberg*, 419 U.S. 379, 391-92, *reh'g denied*, 420 U.S. 955 (1975). Indeed, *Maher v. Roe*, 432 U.S. 464 (1977), decided after this Court summarily affirmed *Fitzpatrick*, effectively overruled *Fitzpatrick's* holding that the state must fund abortions since it funds childbirth.

The Court is even more likely to give little precedential weight to a summary affirmance when the lower court's decision was based on alternative grounds. In *Akron* the Court held that its summary affirmance of *Gary-Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd*, 451 U.S. 934 (1981) was not binding precedent on the second trimester hospitalization question. It disregarded *Gary's* ruling because the district court had decided the issue on the alternative ground of insufficient evidence. *Akron*, 462 U.S. at 433 n.18. In the instant case, the Court can likewise disregard the informed consent findings of *Fitzpatrick*. As in *Gary*, the district court in *Fitzpatrick* ruled on the alternative ground that plaintiffs failed to support their theory that the informed consent requirements chilled the woman's abortion option. 401 F. Supp. at 587.

3 Statement by Dr. Carol Hogue, chief of the pregnancy epidemiology branch of U.S. Centers for Disease Control, quoted in Pollner, *Abortion: Are Medicine and Law on a Collision Course?*, Medical World News, July 8, 1985, at 66, 89.

of the safest surgical procedures in modern medicine[4] and severe psychological sequelae have been shown to be rare.[5]

This requirement, therefore, has all the hallmarks of the propagandistic statements the Court struck down in *Akron*. It imparts no useful information and it exaggerates the danger of abortion for the sole apparent purpose of dissuading a woman from choosing to have one. It is, therefore, unconstitutional. *See Akron*, 462 U.S. at 444-45 (statement that "abortion is a major surgical procedure" and lengthy listing of abortion risks struck down as a " 'parade of horribles' intended to suggest that abortion is a particularly dangerous operation").

2. *Section 3205(a)(1)(iii)—Disclosure of Risks*

This section requires that certain abortion risks be disclosed to every patient, including the risk of "infection, hemorrhage, danger to subsequent pregnancies and infertility." In *Akron*, this Court rejected a substantially similar requirement because of its inflexibility. Specifically, "even if the physician believes that some of the risks . . . are nonexistent for a particular patient, he remains obligated to describe them to her." 462 U.S. at 445.

The Pennsylvania law is similarly inflexible. Although it requires that the risks be described only "when medically accurate," the statute fails to define that ambiguous term. Moreover, liability for failure to disclose a risk is imposed

4 The mortality rate for legally induced abortion is well documented. There were only 1.9 deaths per 100,000 legal procedures in the 1972-1980 period. U.S. Department of Health and Human Services, Centers for Disease Control: Abortion Surveillance 1979-80 at 10, 43 Table 20 (1983). Carrying a pregnancy to term is 7 times more dangerous than terminating a pregnancy prior to 16 weeks gestation; a routine tonsillectomy is 2 times and an appendectomy 100 times more risky than legal abortion. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization: Medical and Social Aspects 155, 168-71 (Hodgson ed. 1981).

5 Hall & Zisook, *Psychological Distress Following Therapeutic Abortion*, 9 Female Patient 168 (1984). Such disturbances are less frequent than those following childbirth. Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, 1 British Medical Journal 476 (February 1977). *See also* Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 Family Planning Perspectives 150, 153, 154 (1978) (predominant feeling following abortion in group surveyed was relief).

without regard to fault.[6] Physicians are therefore left to guess at the point when a risk becomes sufficiently established to require disclosure. The inevitable consequence will be that physicians will feel they must err on the side of caution in order to avoid liability, and disclose all risks, even anecdotal reports, for which there may be no statistically significant scientific evidence, without regard to their own professional judgment or the circumstances of the individual patient. *See Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979) (vague abortion statute with no scienter requirement failed to give physician the room necessary to make his best medical judgment).[7]

This intrusive effect of the statute is heightened by the fact that two of the medical risks singled out for inclusion in the list, the risks to subsequent pregnancy and the risk of infertility, are those for which the medical evidence is quite inconclusive.[8] Recent studies indicate no association between one induced abortion and subsequent pregnancy complications.[9]

6 Physicians are subject to revocation of their licenses to practice medicine and other persons are subject to being found guilty of a summary offense or a misdemeanor. 18 Pa. Cons. Stat. Ann. § 3206(c).

7 This Court has long recognized the principle that vague statutes cause persons to "steer far wider of the unlawful zone" and avoid conduct which would otherwise be constitutionally protected. *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n.6 (1982) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

8 By contrast, the risk of hemmorhage and infection is a known risk of abortions and disclosed to every patient by affiliates of *amicus* PPFA which perform abortions. Risk of danger to future pregnancies is explained as follows: "*Impact of Abortion on Subsequent Wanted Pregnancies*—At this point there is no clear evidence that one early abortion carries any risk to future pregnancies. Women who have had two or more such abortions may have an increased risk of premature deliveries or miscarriages in future pregnancies. Some studies have shown this effect, while others have not." The risk of infertility is mentioned only in the context of the possibility of perforation of the uterus requiring hysterectomy. Planned Parenthood Federation of America, Manual of Medical Standards and Guidelines, Part One, Section VII-E (revised January 1984).

9 Hogue *et al.*, *Impact of Vacuum Aspiration Abortion on Future Childbearing: A Review*, 15 Family Planning Perspectives 119 (1983); *see also* Linn *et al.*, *The Relationship Between Induced Abortion and Outcome of Subsequent Pregnancies*, 146 Am. J. Obstet. and Gynecol. 136 (1983).

Some evidence, however, links abortion by dilatation and curettage (D & C) (as opposed to the more common vacuum aspiration procedures) with miscarriages,[10] or low birth weights[11] in subsequent pregnancies. Studies are evenly divided on the impact of multiple abortions on future reproductive complications.[12] The evidence linking abortion to infertility is even more conjectural. Most studies show no impact on fertility;[13] although some studies do show a link between subsequent infertility and D & C abortion.[14] The statute's vagueness coupled with its imposition of strict liability gives the physician little room to adjudge the validity of these studies or their conclusiveness in establishing risk. Such inflexibility is unconstitutional under the standards set by this Court in *Akron*.

3. *Section 3205(a)(1)(v)—Risks of Childbirth*

This section requires that every woman requesting an abortion be told "the medical risks associated with carrying her child to term." This information may be relevant for some women seeking abortion: for example, those seeking abortion because a continued pregnancy endangers their health or those seeking abortions late in pregnancy when the danger of the procedure approaches the danger of normal childbirth. For many women, however, including women in normal health

10 Hogue *et al.*, *supra* note 9, at 123.

11 Slater *et al.*, *The Effect of Abortion Method on the Outcome of Subsequent Pregnancy*, 26 J. of Reproductive Medicine 123 (1981).

12 Hogue *et al.*, *supra* note 9, at 119.

13 *Id. See also* World Health Organization, Task Force on Sequelae of Abortion, *Secondary Infertility Following Induced Abortion*, 16 Stud. Fam. Plan. 291 (1984); Stubblefield, *et al.*, *Fertility after Induced Abortion: A Prospective Follow-Up Study*, 63 Obstetrics and Gynecology 186 (1984) (This Boston study conducted between 1976 and 1979 compared 1,235 women who had obtained legal abortions, with 912 women who had delivered babies and 939 others who had obtained ob/gyn care. The investigators found no significant difference among all the women's ability to conceive.)

14 Hogue *et al.*, *supra* note 9, at 119.

who have reached a firm decision to have an abortion early in pregnancy, when early abortion is seven times safer than childbirth,[15] the information is medically irrelevant. And for other women, including those seeking abortion because of rape or incest or because they are carrying a defective fetus, the information is both irrelevant and punitive.

By contrast, pregnancy options counseling by affiliates of *amicus* PPFA allows counselors to explore the alternatives for management of a problem pregnancy to the extent desired by the woman, without subjecting her to a state-prescribed lecture on pregnancy and childbirth.[16] Because the Pennsylvania statute fails to give physicians and clinicians leeway to make these individual judgments, it is unconstitutional. *Akron*, 462 U.S. at 445. *Accord Women's Services P.C. v. Thone*, 483 F. Supp. 1022, 1049 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980).

4. *Section 3205(a)(2)(i)—Information on Medical Assistance*

This section requires the woman to be informed that medical assistance may be available for prenatal care, childbirth and neonatal care. This provision is constitutionally objectionable for the same reasons as subsection (a)(1)(v). It is inflexible, requiring the rendition of information to every woman regardless of her circumstances or the status of her abortion decision. The information is misleading and irrelevant for some women: for example, those whose financial or immigration status clearly makes them ineligible for state aid[17] or those who have been explicitly turned down for such aid by state agencies. Yet, the statute allows the clinician no discretion whatsoever as to this statement. For this reason, this statutory requirement also violates the dictates of *Akron*.

15 *See supra* note 4.

16 Manual of Medical Standards and Guidelines, *supra* note 8, at Part One Section VII-C (revised January 1984). PPFA's informed consent fact sheet for abortion merely contrasts the statistical mortality rates associated with early abortion and childbirth. *Id.* at Section VII-E.

17 *See, e.g.*, 42 U.S.C. §§ 1396(a),(n) (Supp. 1985) (amended 1984); 42 C.F.R. § 435.402 (1985).

5. *Section 3205(a)(2)(ii)—Father's Liability*

This section compels the clinician to tell each woman that "the father *is* liable to assist in the support of her child . . ." (emphasis added). This requires medical personnel to give legal advice which is inaccurate, misleading and insensitive to the woman's needs.

For example, in states which allow artificial insemination, the biological father who donates sperm is never responsible for supporting the child. Moreover, a father may not be liable if the mother wrongfully removes the child from the father's home, if the mother has custody and the divorce decree does not provide for support; or if there is no custody order because the child was born soon after the divorce and the child lives with the mother. Annot., 69 A.L.R.2d 203 (1960).

In addition, a woman hearing the declaration that the father is liable for support could mistakenly believe that child support is the father's primary obligation. In most states today, including Pennsylvania, the wife must contribute an amount proportional to her ability to pay. *See Straub v. Tyahla*, 274 Pa. Super. 411, 418 A.2d 472 (1980). The father may not be required to assist in supporting the child at all. Further, the Pennsylvania law ignores the fact that the father's liability may change in the future. Factors such as the father's incapacity, and the child's earnings, education and military involvement all affect the father's liability. Annot., 99 A.L.R.3d 322 (1980) (college); Annot., 39 A.L.R.3d 1292 (1971) (income); 32 A.L.R. 3d 1055 (1970) (military).

Finally, it would be especially cruel to remind rape and incest victims who have decided on abortion that the father is liable to support their child.

Requiring clinicians to make such an inflexible misleading statement does not serve the purposes of informed consent and is unconstitutional under *Akron*.

6. *Sections 3205(a)(2)(iii) and 3208—Required Distribution of Printed Information*

These sections require the clinician to tell a woman seeking an abortion that she has the right to review certain state authored materials. The clinician's statement regarding the

materials must be delivered orally and include the words "the materials describe the unborn child and list agencies which offer alternatives to abortion." § 3205(a) (2)(iii). If the woman elects to view the materials, the clinician must be available to explain them to her in her own language and read them to her if she cannot read. Moreover, the materials must include a statement that the state strongly urges the pregnant woman to contact the agencies before deciding on abortion.

The Pennsylvania law is nearly identical to the requirement this Court struck down in the *Akron* case that physicians orally describe fetal anatomy to the patient and inform her that her "unborn child is a human life from the moment of conception." 462 U.S. at 444. The *Akron* Court viewed these statements as propagandistic rather than informative, requiring physicians to engage in speculation in describing fetal anatomy and espousal of the state's theory of when life begins. *Id.*

Like the *Akron* law, the Pennsylvania statute requires the clinician to act as the state's anti-abortion mouthpiece. He or she must make a script-like oral statement on the "unborn child"[18] and hand over a state-prescribed lecture on fetal anatomy and the preferability of childbirth over abortion. The unconstitutionality of this section is not mitigated by the fact that the information is supplied by the state, is purportedly objective and is not, strictly speaking, required reading for the women. First, a mere recitation of objectivity does not guarantee it especially in view of the clear anti-abortion purpose of the statute. *See* 18 Pa. Cons. Stat. Ann. § 3202 (Legislative intent); *A.C.O.G. v. Thornburgh*, 737 F.2d at 288-89. More significantly, the physician is not a passive conduit for the state's anti-abortion diatribe.[19] Because he must explain the materials to the patient, even read them to her, he is inextricably bound up in their delivery. As one federal district court said in striking down a nearly identical Rhode Island law,

18 *See also Margaret S. v. Treen*, 597 F. Supp. 636, 661 (E.D. La. 1984) ("the term 'unborn child' . . . could increase a woman's guilt surrounding the abortion decision by implying that she is taking the life of a person").

19 One court viewed descriptions of fetal anatomy as inherently propagandistic in the context of abortion consent laws. "The primary purpose of the required information is not so much factual as it is moral." *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1022 (1st Cir. 1981).

> To say that the mandate of the Rhode Island statute merely insures that the patient knows such material is available is delusory. At a minimum, the doctor will have to relate what the materials are, who published them, and where they may be obtained. In many cases, depending on the curiosity of the patient at being informed of the existence of these state materials, a doctor may feel compelled to give an evaluation. Indeed, a woman patient may well decide whether or not to peruse the State's publications based on the evaluation she receives from her attending physician. The physician cannot play a passive role in this administering requirement. Such passivity might well be perceived as inconsistent with the doctor's role of medical advisor to the patient.

Women's Medical Center of Providence v. Roberts, 530 F. Supp. 1136, 1154 (D.R.I. 1982). In a similar manner, the state of Pennsylvania has here attempted to inject its anti-abortion sentiments into the physician-patient relationship.[20]

This section, in its inflexibility, also violates the second prong of the *Akron* test. Physicians must distribute the state materials to their patients regardless of their view of the materials' accuracy, relevance or medical advisability. This impedes physicians' ability to tailor the information to the individual patient's needs and thus violates the constitutional standards set by this Court. *See also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d at 1021-22; *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980); *Margaret S. v. Treen*, 597 F. Supp. at 662-63; *Women's Medical Center*, 530 F. Supp. at 1152-54 (requirements that physicians describe fetal anatomy struck down because that they impede physicians' ability to do what is best for their patients).

7. *Absence of Emergency Provision*

The informed consent provision is also unconstitutional because it fails to make an adequate exception for emergency situations in which rendition of the prescribed information

20 Although the State has a legitimate interest in promoting childbirth over abortion, *Harris v. McRae*, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980), it may not do so in a manner which, as here, directly intrudes upon the abortion decision. *Akron*, 462 U.S. at 444 & n.33.

would endanger the woman's life or health. The emergency exception is limited to situations in which an immediate abortion is necessary to avert the death of the mother. 18 Pa. Cons. Stat. Ann §§ 3303, 3305(b).[21] This limited definition is contrary to both constitutional and common law. Under the common law of torts, a risk to either the life *or health* of the patient may require emergency treatment obviating the need for informed consent.[22] Moreover, according to *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, a woman's life *and health* are always protected against state interference. *See id.* at 165; *Akron*, 462 U.S. at 428.

In summary, the Pennsylvania law directly and significantly interferes with a woman's abortion choice by burdening her physician with criminal penalties for failure to make statements which are biased, irrelevant and in conflict with his or her professional judgment. It therefore exceeds the permissible boundaries set by this Court for the otherwise important state interest in ensuring a woman's informed consent to abortion. It should be held unconstitutional.

B. The Informed Consent Provisions Abridge Physicians' First Amendment Rights

Sections 3205 and 3208 of the Pennsylvania law require physicians to foster the state's anti-abortion ideology in violation of their first amendment right to be free from government coerced speech in matters of belief, opinion and ideology.[23]

21 The medical emergency definition also waives the 24-hour waiting period if it would cause "grave peril of immediate and irreversible loss of major bodily functions." 18 Pa. Cons. Stat. Ann. § 3203. The 24-hour waiting period has been conceded to be unconstitutional by the appellants and it is not clear that this somewhat broader emergency exception would apply to the informed consent requirement standing alone. Even if it would, its definition of danger to health is unconstitutionally restrictive. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

22 A. Rosoff, Informed Consent: A Guide for Health Care Providers 14 (1981).

23 Sections 3205 and 3208 likewise abridge women's first amendment rights to refuse to listen to the state's ideological messages. By requiring all women to listen to this anti-abortion lecture as an absolute precondition of obtaining a legal abortion, these sections violate the first amendment rights of captive auditors. *See, e.g., Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952); *Lehman v. Shaker Heights*, 418 U.S. 298, 307 (1974).

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind" (citation omitted). . . .
>
> . . . where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

Wooley v. Maynard, 430 U.S. 705, 714, 717 (1977). *Accord West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Elrod v. Burns*, 427 U.S. 347 (1976). *See also Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting) (abortion consent laws may violate first amendment if they require physician to affirm state's ideology).

The informed consent provisions of the Pennsylvania Act require physicians to be the state's ideological courier on the abortion issue in a number of ways. In describing a state authored pamphlet on fetal development, physicians must orally refer to the fetus as an "unborn child", language which expresses the state's theory of when life begins. *See Roe v. Wade*, 410 U.S. at 159-62; *Akron*, 462 U.S. at 444. Physicians must also pass out a pamphlet describing fetal development and "strongly urging" the woman to contact maternal assistance agencies before deciding about abortion.[24] They must also describe abortion in a particularly unsettling manner, as involving dangerous unforeseeable risks or risks which remain hypothetical or medically unproven.

Such required statements are no different from the compulsory flag salute struck down in *Barnette*, 319 U.S. 624, or the license plate bearing the motto "Live Free or Die" which New Hampshire motorists were required by the state to display held unconstitutional in *Wooley v. Maynard*, 430 U.S. 705 (1977). They are an attempt by state officials to "prescribe what shall be orthodox in politics, nationalism, religion or

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24 *See also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d at 1022 (fetal description requirement struck down on first amendment grounds).

other matters of opinion [and to] force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. As such they must be held unconstitutional.

II. THE PARENTAL CONSENT PROVISION IS UNCONSTITUTIONAL

A. The Court Of Appeals Acted Correctly In Barring Implementation Of The Statute Until Rules Were Promulgated For Expedited And Confidential Procedures

The court of appeals held that the operation of Pennsylvania's requirement of parental consent for abortion should be enjoined until the state promulgated rules to assure confidentiality and expedition in judicial proceedings to waive the consent requirement. 737 F.2d at 297. *Amici* support this decision. As the court stated, "To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality and form." *Id. Accord Zbaraz v. Hartigan*, 763 F.2d 1537 (7th Cir. 1985); *Wynn v. Carey*, 582 F.2d 1375, 1389 (7th Cir. 1978); *Glick v. McKay*, No. CV-R-85-331-BCR (D. Nev. July 17, 1985).

The importance of specific procedures and timetables has been borne out in practice. For example, although the Missouri law upheld by this Court in *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), also directed the state courts to provide by rule for expedited appeals, no such rules had been made when in November 1983, a minor actually sought appellate review of a denial of her petition to waive the parental consent requirement. Consequently, her motion for expedited appeal was denied by the Missouri courts. She then had to turn for relief to the federal district court which restrained further implementation of the statute. *T.L.J. v. Ashcroft*, 585 F. Supp. 712 (W.D. Mo. 1983), *dismissed on other grounds*, May 29, 1985, *appeal docketed*, No. 85-1969 WM (8th Cir. June 6, 1985).

Moreover, in other states which generally provide for "expedited" proceedings but fail to mandate a specific timetable, untoward delays, caused by overcrowded dockets and the unwillingness of most judges to hear minors' abortion peti-

tions, have been reported.[25] Minors are forced to wait two to three days, even a week merely to schedule a hearing.[26]

This Court has noted the detrimental effects of delay on the health of a woman seeking abortion. *Akron*, 462 U.S. at 435. The health risks rise dramatically with each week an abortion is postponed.[27] For teenagers these delays are especially critical. Since a disproportionate number of very young women seek abortions late in pregnancy,[28] a delay of a week could put a teenager over the limit for an instrumental evacuation abortion such as vacuum aspiration or dilatation and evacuation (D & E).[29] She would then be required to abort the pregnancy by a labor induction abortion, which is more dangerous, painful, emotionally traumatic and expensive.[30] In addition, such procedures generally require hospitalization and only a small proportion of hospitals are willing to provide any second trimester abortions.[31] The added costs and diminished accessibility may well put an abortion out of reach for some teen-

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25 Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Family Planning Perspectives 259 (1983).

26 *Id.* These delays and other factors are currently part of "as applied" challenges to parental consent laws in Minnesota, *Hodgson v. State of Minnesota*, 3-81 Civ. 538 (D. Minn., filed July 30, 1981), and Massachusetts, *Planned Parenthood League of Massachusetts v. Bellotti*, No. 81-124 (Mass. Commonwealth Sup. Jud. Ct., filed April 17, 1981).

27 Mortality risks rise 30% on the average with each week an abortion is delayed. Tietze, Induced Abortion, A World Review, 1983 at 92 (5th ed. 1983).

28 Centers for Disease Control: Abortion Surveillance, *supra* note 4, at 6.

29 Grimes, *Second Trimester Abortions in the United States*, 16 Family Planning Perspectives 260, 264 (1984). (Physicians set various gestational limits on performance of D & E abortions: from 16 to 24 weeks.)

30 Kafrissen *et al.*, *Midtrimester Abortion: Intra-amniotic Instillation of Hyperosmolar Urea and Prostaglandin F2 alpha v. Dilatation and Evacuation*, 251 J.A.M.A. 916, 918-19 (1984).

31 Henshaw *et al.*, *Abortion Services in the United States, 1981 and 1982*, 16 Family Planning Perspectives 119, 125 (1984).

agers, especially in states which do not provide public funding for abortion.[32]

Although *amici* believe laws requiring parental consent for abortion are ill-advised, states which do put such laws into effect must be as explicit as possible in guaranteeing speed and privacy for minors attempting to use the judicial process to obtain a waiver of these requirements. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 644 (1979). The court of appeals should be affirmed.

B. The Procedures Promulgated By The Pennsylvania Supreme Court Do Not Meet Constitutional Standards

Although the Pennsylvania Supreme Court has now promulgated rules to govern minors' petitions for judicial authorization for abortions, these rules do not render the parental consent provision constitutional.

1. *The Rules Fail to Guarantee Confidentiality*

Rule 16-4 states that "all persons shall be excluded from the hearings except the applicant, her parents or persons standing in loco parentis, and such other persons whose presence is specifically requested by the applicant or her guardian." The regulations thus permit a minor's parents to be present at the hearing to waive parental consent.[33] This rule is clearly in conflict with this Court's holdings in *Bellotti II* and *Akron*. In both cases, parental consent laws were struck down as unconstitutional specifically because they contained provisions allowing parents to be present at the hearing. 443 U.S. at 646-47; 462 U.S. at 441 n.31.

2. *The Rules Fail to Guarantee an Expedited Procedure*

Although the Supreme Court Rules provide a timetable for procedures to waive parental consent, it is far from expedited.

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32 Only fifteen states and the District of Columbia provide generally for abortions in their Medicaid programs. Other states fund abortions only in extreme circumstances such as rape and incest or to save the woman's life .

33 Any doubt about the meaning of this Rule is dispelled by Appellants in their Brief. In explaining Rule 16.4 they state, "the proceeding shall be closed to all but essential persons such as the minor's parents." Brief for Appellants at 79.

Rule 16.7 allows the trial court to take three business days to rule, and, after perfection of the appeal, it allows the appellate court seven business days to decide on the minor's appeal. Thus, a delay of two to three weeks is built into any waiver procedure where a petition is denied. As shown in the preceding section, such delays can make abortions more dangerous and costly as well as less accessible. The delay contemplated by the Pennsylvania law is hardly the expedited procedure this Court envisioned in *Bellotti II*, 443 U.S. at 644, and *Ashcroft*, 462 U.S. at 491 n.16.

For all the foregoing reasons, the Pennsylvania parental consent law should be held unconstitutional.

III. THE REPORTING AND DISCLOSURE PROVISIONS OF SECTION 3214 OF THE PENNSYLVANIA ACT UNDULY BURDEN A WOMAN'S RIGHT TO ABORTION AND TO ASSOCIATION AND ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST

Section 3214(a) of the Act requires medical providers to submit to the state department of health a detailed individual report on each abortion performed. The report must include the name of the physician who performed the abortion and the facility where the abortion was performed; the name of the referring physician; the woman's age, race, marital status, and number of prior pregnancies; her political subdivision and state of residence; the date on which a pregnancy determination was made; the date of the medical consultation required under another section of the Act; the date of the abortion and the type of procedure performed; the date of the woman's last menstrual period and probable fetal gestational age; length and weight of the aborted fetus; any medical complications; and the method of payment for the procedure.

Additionally, § 3214(a) mandates the reporting of certain information specified in other sections of the Act, including the basis for the physician's determination after the first trimester of pregnancy that "the child is not viable", or, if he determines that the fetus is viable, the "basis for his determination that the abortion is necessary to preserve maternal life or health" (§ 3214(a)(8), cross referenced to § 3211(a)). Also required is the basis for the physician's judgment regarding

choice of abortion technique after the fetus is determined to be viable (§ 3214(a)(13), cross referenced to § 3210(b)).

Section 3214(b) requires the physician who performed the abortion to sign the report and submit it to the state department of health within 15 days after each reporting month. The entire report is then made available to the public for inspection and copying after a "unique identifying number" is substituted for each physician's name. Although the identity of the person filing the report is kept confidential (§ 3214(e)(2)), the identity of the facility where the abortion was performed is not.[34]

Additionally, § 3214(h) requires the reporting of medical complications from an abortion or attempted abortion, as well as additional information about the woman herself, and mandates public disclosure of the report, which includes the name and address of the facility where the abortion was performed.

A. The Public Disclosure Provisions Of § 3214 Render The Statute Unconstitutional.

1. *The Statute Violates the Woman's Right to Privacy*

Amici support the holding of the court of appeals that the nature and complexity of the reporting requirements of § 3214 constitute an impermissible burden on the woman's right to choose abortion. *A.C.O.G. v. Thornburgh*, 737 F.2d at 302. Additionally, *amici* urge affirmance of the court of appeals' holding because public disclosure of such detailed information unconstitutionally intrudes upon a woman's right of privacy in deciding whether to have an abortion, as well as her right to associate with a particular physician or medical facility in order to effectuate this decision. These constitutional rights are threatened because the compelled disclosure of detailed information concerning the woman and the identity of the facility where each abortion is performed could easily lead to the identification of both the woman and her physician by members of the public, thus subjecting women, their physicians and clinic personnel to acts of violence, intimidation and harassment by those opposed to abortion.

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34 Because the statutory definition of "facility" includes a physician's office (§ 3203), the confidentiality of the physician's name cannot be ensured.

Public disclosure raises the alarming possibility that the woman herself will be identified. Detailed information in the report, including the abortion patient's race, age, area of residence, and the dates of her medical consultation and abortion, as well as the identity of the facility and details of the abortion procedure, can be compared with information obtained from the license plate numbers of cars parked at clinics and photographs of patients taken by abortion opponents during clinic demonstrations.[35] The real possibility that particular women can thus be identified constitutes an unwarranted invasion of the individual's privacy interests. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Whalen v. Roe*, 429 U.S. 589 (1977). Harassment of women, their physicians, and clinic personnel adversely affects the delivery of medical services and infringes upon the physician's right to exercise his or her medical judgment free from undue interference. *Roe v. Wade*, 410 U.S. at 163; *Doe v. Bolton*, 410 U.S. at 191-92; *Colautti*, 439 U.S. at 387.[36]

The constitutional privacy rights sought to be shielded here are no mere abstractions. Armed with the identities of facilities, physicians and patients, anti-abortion foes in this country are prepared to wreak havoc in their determination to stop legal abortion.

Incidents of violence and harassment directed against abortion providers, their patients and staff have risen dramatically since the beginning of 1984. In 1984 alone, there were 28 reported bombings and arson attacks against abortion providers—up from a total of 10 such incidents in the two preceding years combined.[37] The first four months of 1985

35 *See infra* description of the tactics of anti-abortion opponents, at 22-23.

36 As this Court stated in *Colautti*, 439 U.S. at 387, "*Roe* stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out . . . [and] *Roe's* companion case, *Doe v. Bolton*, underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment."

37 The Washington, D.C. offices of the National Abortion Federation and the American Civil Liberties Union were also bombed in 1984. *Attacks on Reproductive Health Facilities*, 5 Planned Parenthood Review 16 (1984/85).

have seen eight such reported incidents.[38]

Physicians and staff at clinics providing abortion services have received repeated death threats from abortion opponents.[39] Abortion providers are also the targets of frequent bomb threats which disrupt the provision of medical services and sometimes necessitate the evacuation of staff and patients in the midst of scheduled medical procedures.[40]

Violent and hostile protests at reproductive health care clinics are also increasing in number and intensity.[41] Patients and staff entering these facilities have been confronted with protestors who scream obscenities, threaten them with abusive language, and accuse them of being murderers, mercenaries, butchers, and baby-killers. Many demonstrators chant and sing loudly, using bullhorns and other amplification devices that can be heard inside medical facilities. Placards and leaflets depicting dismembered fetuses and inscribed with inflammatory language and epithets are waved in a threatening manner and thrust at people who attempt to enter the clinic. Demonstrators have also blocked clinic ingress and egress, stopped cars entering the premises, occupied parking space reserved for clinic patients, formed human chains in front of and around medical facilities, and physically pushed, shoved and grabbed patients and staff.[42] Other harassment has included clinic "invasions" and "sit-ins" by protestors who force their way

38 The Other Side: A Report On Clinic Violence, Harassment and Other Anti-Abortion Activities (June 1985) (Internal Planned Parenthood Publication).

39 N.Y. Times, Aug. 11, 1985, § 6 (Magazine), at 18.

40 *American College of Obstetricians and Gynecologists, Pennsylvania Section (A.C.O.G.) v. Thornburgh*, No. 82-4336, slip op. at 32 (E.D. Pa. June 17, 1985).

41 *Id.* at 25-26, 31-32.

42 *See, e.g., Feminist Women's Health Center v. Women Exploited by Abortion*, No. 83-2-04152-8 (Super. Ct. Wash. 1984); *Women's Health Care International v. Jackson County Right to Life*, No. 45,301 (Ch. Ct. Miss. 1984); *Planned Parenthood of Monmouth County v. Cannizzaro*, No. C-2416-84 (Super. Ct. N.J. 1984); *Parkmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dep't 1982).

into clinics, where they harass staff and patients and disrupt the provision of medical services.[43]

More significantly, anti-abortion protesters aim their tactics at individual physicians, staff and abortion patients. They photograph and videotape patients entering the clinic, record the license plate numbers on cars parked at the clinic in order to obtain the owners' names and addresses, call out to staff members by name and display their names on signs and placards, and picket the personal residences of physicians and staff.[44]

Such tactics are openly promoted by leaders of the anti-abortion movement. In his recent book, the director of the Pro-Life Action League devotes dozens of chapters to the "how-tos" of harassment of individuals and clinics, as well as clinic demonstrations and invasions.[45] Among other things, he advocates the hiring of private detectives to track down pregnant women who intend to have abortions and even professes to having done so. Tactics such as these, because they involve the identification and harassment of individual women, are particularly disturbing.

Another anti-abortion activist has used confidential hospital information to contact women who had been scheduled for abortions in an effort to "counsel" and dissuade them from undergoing the procedure.[46] In a separate incident, the mother

43 *A.C.O.G. v. Thornburgh*, slip op. at 11-12.

44 *See, e.g., id.* at 10, 12-13, 16; *Feminist Women's Health Center*, No. 83-2-04152-8; *Clinic For Women v. Citizens for Life*, No. 83-2651 (Cir. Ct. Ind. 1983); *Planned Parenthood of Monmouth County*, No. C-2416-84.

45 J. Scheidler, Closed: 99 Ways to Stop Abortion (1985). To prevent women from having abortions, the author encourages opponents of abortion to pose as patients in order to gain access to the clinic and disrupt the provision of services, utilize "telephone teams" to flood clinic telephone lines and schedule appointments, and leave "educational" messages about the "crime of abortion" on the clinics' after-hour tapes so as to prevent women seeking abortions from leaving messages. Also encouraged is the use of "horror stories" and "inflammatory rhetoric" to describe the "death camps" and "holocaust" of legalized abortion, signs and placards depicting dismembered fetuses, and effigies of public figures who have upheld or supported a woman's fundamental right to abortion.

46 Spake, *The Propaganda War Over Abortion*, Ms. Magazine, July 1985, at 88.

of a woman was notified by abortion opponents that her daughter had had an abortion. A phone call to the mother was followed by a letter stating the same information and naming one of the doctors who participated in the procedure. The letter, signed "Pro-Life", was followed shortly thereafter by another letter soliciting contributions for the National Right to Life Committee.[47]

Even the state of Pennsylvania recognizes that patient care may suffer if physicians and clinics are harassed or threatened. Before enactment of the Abortion Control Act in 1982, the state's policy was to separate abortion records submitted by each facility from the cover sheet identifying the facility in order to avoid possible reprisals by those opposed to abortion.[48]

Courts have also recognized that women who are forced to face such harassment experience trauma and anxiety which complicate medical treatment and hinder their recovery. For example, in a recent decision involving other provisions of the same statute at issue here, the United States District Court for the Eastern District of Pennsylvania struck down a statutory requirement of public disclosure of the names of abortion facilities because it found that compelled disclosure would lead to increased harassment and adversely affect women seeking abortions.[49]

47 *See* Planned Parenthood Public Affairs Newsletter at 3 (April 20, 1984).

48 *A.C.O.G. v. Thornburgh*, slip op. at 4. *See* Joint Appendix at 50a—51a (parties' stipulation of fact that "[d]uring the past several years, numerous abortion providers, both in Pennsylvania and throughout the country have been the object of threatened violence or actual violence, including firebombings, arson, shootings, vandalism, sit-ins and demonstrations.")

49 Sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act mandated public disclosure of the identity and location of abortion facilities and affiliated organizations as well as the total number of abortions performed at each facility and the number performed in each trimester of pregnancy. *See also Feminist Women's Health Center*, No. 83-2-04152-8 (clinic and individual harassment by abortion opponents created a stressful atmosphere which increased medical risks to the patients, affected physician performance, caused staff to resign, and resulted in cancelled appointments and no-shows).

2. *The Statute Unduly Burdens the Right to Association*

The harassment to which the Pennsylvania law subjects women, their physicians, and medical facilities, burdens the woman's right to associate with the physician or facility of her choice as well as her fundamental right to abortion. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), this Court held that public disclosure requirements such as those at issue here were unconstitutional because such disclosure would subject the persons identified to threats, harassment or reprisals. *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

> The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. . . . The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. at 93 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

Here, as in *Brown*, there is a "reasonable probability" that the disclosure requirements of § 3214 will subject women seeking abortions and the staff and facilities where abortions are performed to increased threats, harassment or reprisals. Past violence against clinics which provide abortion services and harassment of women seeking abortions and of the physicians and staff of these clinics is well documented and the evidence points to a rise in the number and level of violent and hostile confrontations.

3. *No State Interest Justifies the Intrusion on Constitutional Rights*

No state interest—compelling or otherwise—justifies the instrusion on the rights to abortion and association worked by this law. While this Court has recognized that recordkeeping requirements may be appropriate and useful to the state's

interest in preserving maternal health, *Danforth*, 428 U.S. at 81, it has repeatedly held that such reports must be confidential in order not to compromise the privacy interests involved. In *Danforth*, this Court upheld certain state reporting requirements because, *inter alia*, the reports were not available for public inspection: "[t]he added requirements for confidentiality, with the sole exception for public health officers . . . assist and persuade us in our determination of the [statute's] constitutional limits." *Id.* at 81-82. *See also Whalen v. Roe*, 429 U.S. 589 (1977).

Appellants' argument that the information reported pursuant to § 3214 "must be made available if it is to be useful" (Brief for Appellants at 63, n.21) begs the question of who should have access to this information. The state can achieve its stated objective of protecting the health of its citizens by requiring medical facilities to prepare statistical compilations of relevant health data for use by state health officials. Making detailed individual reports available to members of the general public, however, does not further any legitimate state interest.

Unlike the reporting provisions upheld in *Danforth*, the Pennsylvania Act mandates public disclosure of information that would impact adversely upon the constitutional rights of women seeking abortions and upon physicians and medical facilities which provide abortion services. Because there is no state interest which justifies public disclosure of this information, subsections (a), (b), (e) and (h) of § 3214 of the Pennsylvania Act are invalid.

B. The Requirement That Physicians Report the Basis For Their Determination of Fetal Non-Viability After the First Trimester Is Unconstitutional

Amici support the court of appeals holding that the requirement that a physician report the basis for his determination that "a child is not viable" as to abortions performed subsequent to the first trimester (§ 3214(a)(8), cross referenced to § 3211(a)) violates this Court's directive that a physician be accorded broad discretion in making such determinations, chills physician willingness to perform abortions and does not further any important state interest. *A.C.O.G. v. Thornburgh*, 737 F.2d at 302.

This Court has stressed repeatedly the importance of affording the physician adequate discretion in the exercise of his or her medical judgment, including the determination of the point at which a particular fetus is viable. *Colautti*, 439 U.S. at 388-89. *See also Danforth*, 428 U.S. at 64.

Yet the Pennsylvania legislature has usurped the broad discretion vested in physicians by enacting a law which presumes that the fetus is viable subsequent to the first trimester of pregnancy unless the attending physician reports the basis for his or her determination otherwise. (The statute does not require the physician to report the basis for his or her determination that the fetus is viable).

Section 3211(a) also sweeps unnecessarily broadly by requiring the reporting of the basis for determination of fetal non-viability as to abortions performed at a point in the pregnancy when there is not even a remote chance of viability. *See Danforth*, 428 U.S. at 83; *Colautti*, 439 U.S. at 389. During most of the second trimester of pregnancy, the possibility of fetal viability is nil, and even at the end of this period (22-24 weeks), viability is only an extremely remote possibility.[50]

Physicians whose medical judgment regarding second trimester non-viable fetuses will be scrutinized by the State and who face professional and criminal sanctions for non-compliance with the statute will be chilled from performing abortions after the first trimester. *Colautti*, 439 U.S. at 396; *A.C.O.G. v. Thornburgh*, 737 F.2d at 302.

Amici also agree with the court of appeals holding that there is no important state interest furthered by requiring physicians to make a report under § 3211(a) as to abortions of non-viable fetuses in the second trimester. 737 F.2d at 301. The state's compelling interest in protecting fetal life arises at the point of viability, which usually occurs sometime in the third trimester of pregnancy. *Roe v. Wade*, 410 U.S. at 160. Even if, as appellants contend, "it is untenable to suggest that the State

50 The court of appeals noted that appellants adduced no evidence to the contrary. *A.C.O.G. v. Thornburgh*, 737 F.2d at 301. *See* Dunn and Stirrat, *Capable of Being Born Alive?*, 1 Lancet 553 (1984). This Court has noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe v. Wade*, 410 U.S. at 160.

may not require verification of the basis for *third-trimester abortions*" to further its interest in protecting fetal life (Brief for Appellants at 64, n. 21) (emphasis added), such verification is unwarranted during the second trimester.

IV. SECTION 3210(b)'s FETAL PROTECTION PROVISION IS UNCONSTITUTIONAL

This section of the Pennsylvania Act requires a physician to choose the post-viability abortion technique which provides the best opportunity for the fetus to be "aborted alive" unless it would pose "significantly greater" medical risk to the life or health of the pregnant woman. 18 Pa. Cons. Stat. Ann. § 3210(b). The court of appeals rejected appellants' contention that the term "significantly" should be construed as mere surplusage and held the statute unconstitutional because it requires the woman to risk her health in order to benefit the fetus. 737 F.2d at 300 (citing *Colautti*, 439 U.S. at 400). *Amici* support the court of appeals' construction of the statute and its constitutional conclusion.

In their brief to this Court, appellants attempt to minimize the impact of the statute. They claim that, even if it is read as appellees claim it should be—to give the word "significant" a quantitative meaning and thus render the provision unconstitutionally burdensome—the restrictions placed on abortion practice are merely theoretical because "there simply is no evidence that there are alternative post-viability abortion methods with marginal, but not significant . . . relative risks to women." Brief for Appellants at 87. This argument distorts the very real impact which the statute would have on physicians attempting to protect their patients' health and at the same time steer clear of criminal prosecution.

In the extremely rare case of a very late abortion[51] the physician must make a difficult choice among abortion

51 For the purposes of this brief it is assumed that the statute has its earliest application between the 22nd and 24th weeks of pregnancy. The earliest known survivors of premature delivery are at 23 weeks. Dunn and Stirrat, *supra* note 50, at 554. Whether a fetus would be viable at this point would, however, be a judgment for the attending physician based on the facts of the case before him. *Colautti*, 439 U.S. at 396.

Since 1975, one percent or fewer of abortions are performed at 21 or more weeks gestation. Grimes, *supra* note 29. A group of investigators in Georgia

methods.[52] The relative risk of various methods is not fully established,[53] partly because the number of cases is so small.[54] Contrary to appellants' unsupported assertion, what data there are show that a number of methods are quite close together in terms of risk of death[55] and overall risk of serious complications, but differentiable in terms of particular risks and other health factors which may be relevant to an individual patient's case.[56] The serious criminal penalties attendant upon error will lead physicians to hesitate to base their medical judgment on these factors, which, while perhaps not dramatic epidemiologically, would make a real difference to the health of individual women.

Moreover, the effect of the provision is exacerbated by its vagueness. Since "significantly greater" is not defined, physicians are left guessing what quantum of risk will clear the statutory hurdle. Inevitably the result will be that physicians will give the statute its widest possible berth, favoring fetus-preserving abortion methods over those which could enhance the woman's health. This is precisely the result this Court sought to avoid in *Colautti*, 439 U.S. 379. In that case, the Court struck down the predecessor to this law in part because

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found that abortions are hardly ever performed at 25 weeks gestation or later. Spitz *et al.*, *Third-Trimester Induced Abortion in Georgia, 1979 and 1980*, 73 Am. J. Pub. Health 594 (1983).

52 *See generally* Grimes & Cates, *Dilatation and Evacuation*, in Second Trimester Abortion, Perspectives after a Decade of Experience 119-20 (Berger *et al.*, eds. 1981).

53 This contrasts with abortions at an earlier stage of gestation where certain techniques have been established as far superior to others. For example, instrumental evacuation procedures up to the 16th week are clearly safer than labor induction abortion, Grimes, *supra* note 29, and vacuum aspiration is safer than surgical curettage in the first trimester. Tietze, *supra* note 27, at 88.

54 *See, e.g.*, Centers for Disease Control: Abortion Surveillance, *supra* note 4, at 11.

55 *See* Grimes, *supra* note 29.

56 Binkin *et al.*, *Urea-Prostaglandin versus Hypertonic Saline for Instillation Abortion*, 146 Am. J. Obstetrics and Gynecology 947, 952 (1983).

of its vagueness and in part because it appeared to require physicians to make a "trade-off" between fetal survival and the patient's health. *Id.* at 400. *See also United States v. Vuitch*, 402 U.S. 62, 71-72 (1971); *Doe v. Bolton*, 410 U.S. at 192 (patient's health broadly defined to include psychological and physical well-being).

As an example, an abortion utilizing prostaglandins is probably the most likely method to lead to a surviving fetus.[57] Yet this method is now rarely used as a sole abortifacient,[58] in part because it has been shown by most, but not all, studies to have a higher rate of major complications than other methods;[59] because of its severe gastro-intestinal side effects;[60] and because it entails a longer period between administration of the abortifacient and expulsion of the products of conception than other available methods of labor induction abortion,[61] resulting in more pain and discomfort for the patient.[62] Yet, physicians will be placed in a quandary as to whether these differences in risk meet the statutory test.

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57 Grimes, *supra* note 29, at 264. Hysterotomy is also more likely to lead to live birth but it is now rarely used. *Id.*

58 Grimes & Cates, *The Brief for Hypertonic Saline*, 15 Contemporary Ob/Gyn 29, 38 (1980). Prostaglandins are more often used as an adjunct to other abortifacients, such as urea. *Id.*

59 *Id. But cf.* Cates *et al.*, *Dilatation and Evacuation Procedures and Second Trimester Abortions: The Role of Physician Skill and Hospital Setting*, 248 J.A.M.A. 559, 560-61 (1982); Robins & Surrago, *Alternatives in Midtrimester Abortion Induction*, 56 Obstetrics and Gynecology 716, 719-20 (1980).

60 Robins & Surrago, *supra* note 59.

61 An abortion utilizing urea and prostaglandin produces abortion faster than prostaglandins alone. Wilson, *Mid Trimester Abortion with Urea, Prostaglandin F2 alpha, Laminaria and Oxytocin: A New Regimen*, 51 Obstetrics and Gynecology 699 (1978).

62 Binkin *et al.*, *supra* note 56, at 952.

Because the Pennsylvania statute leaves the physician no room to make the necessary professional judgment in this difficult area without fear of criminal prosecution, it is unconstitutional. *Colautti*, 439 U.S. at 400-01; *Danforth*, 428 U.S. at 67 n.8.

V. THE SECOND PHYSICIAN REQUIREMENT IS UNCONSTITUTIONAL

This section requires the attendance of a second physician at any abortion that does not preclude the possibility of fetal survival. 18 Pa. Cons. Stat. Ann. § 3210(c). *Amici* support the court of appeals' holding that the provision is unconstitutional because it fails to make an exception for emergencies. 737 F.2d 283 at 300-301; *Ashcroft*, 462 U.S. at 485 n.8 (Powell, J.) and 501 (Blackmun, J., concurring).

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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